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GLOBAL BONANZA SDN BHD

v.

FOO CHEONG SENG & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
SM KOMATHY JC
[CIVIL SUIT NO: S22-467-2010]
22 NOVEMBER 2013

C ***CONTRACT:*** *Breach - Agreement - Claim for damages - Supply of defective machinery and equipment for biodiesel plant - Whether defective - Whether biodiesel plant able to produce oil which met American and European quality standards - Whether claim supported by expert report*

D ***CONTRACT:*** *Damages - Agreement - Facility agreement - Condition precedent for drawdown - Whether complied with prior to drawdown - Whether drawdown released pursuant to drawdown notice - Whether banker negligent in releasing drawdown*

E ***CONTRACT:*** *Mistake - Rectification - Intention of parties - Whether obvious mistake - Whether rectification necessary*

TORT: *Negligence - Banks - Facility agreement - Condition precedent for drawdown - Whether complied with prior to drawdown - Whether drawdown released pursuant to drawdown notice - Whether banker*
F *negligent in releasing drawdown*

The plaintiff company was incorporated by the first defendant and Tony Goh Sook San ('Tony') for the purpose of a construction contract. On 4 July 2007, the plaintiff entered into an engineering,
G procurement, construction and commissioning contract ('the EPCC') with the second defendant for the construction of a biodiesel plant ('the project') in Kuching. Clause 1.5 of the EPCC contract expressly provided for the appointment of CM Bernardini, Italy (and its associate in Malaysia, Intersonikon
H Engineering Sdn Bhd) or another company with proven track record, to be the technology provider for the project. Bank Pembangunan Malaysia Berhad ('the third defendant') agreed to partially fund the project. Pursuant to a letter of appointment dated 30 May 2007, the fourth defendant was appointed by the
I plaintiff as the Independent Checking Engineer ('ICE') from a panel of consultants of the third defendant. The copies of all reports prepared by the ICE in relation to their checking and

inspection of the work carried out by the second defendant based on the work schedule were submitted to the plaintiff and the third defendant at all times. In April 2009 a company called Rapidtech Solutions Sdn Bhd ('Rapidtech'), which belonged to the first defendant, was appointed as the technology provider of the project instead of CM Bernardini and neither the third nor the fourth defendants were informed of the substitution. On 17 April 2009, pursuant to the plaintiff's request, the third defendant approved and released the third drawdown and in so doing, the third defendant had, amongst others, relied on a report prepared by the ICE. In September 2009, the plaintiff commenced a Civil Suit D-22NCVC-95-2009 ('the civil suit') against the first defendant and Rapidtech seeking a declaration that the first defendant was in breach of his fiduciary duties in appointing Rapidtech as technology provider without disclosing to the board that the company belonged to him. On 7 June 2010, the parties recorded consent judgment in respect of the civil suit. On 21 May 2010, the plaintiff commenced the present action claiming: (i) against the first defendant for damages suffered as a result of Rapidtech supplying machinery and equipment that were defective to the second defendant which resulted in the biodiesel plant that was constructed by the second defendant being unable to produce biodiesel oil that could meet the American and European quality standard; (ii) against the third defendant premised on the allegation that it had been negligent in approving and releasing the third drawdown in breach of the conditions stipulated in the facilities agreement; (iii) against the fourth defendant on the allegation that it had been negligent in certifying that the conditions for the third drawdown had been met, in particular, that the major machinery had already arrived at the site, when it had not; and (iv) further, and/or in the alternative that the first, third and fourth defendants had conspired and colluded with intent to injure and defraud the plaintiff to cause loss. The issues for determination in this case were: (i) whether the plaintiff's claim was barred by *res judicata*; (ii) whether the biodiesel plant was not able to produce oil that met the American and European quality standards; (iii) whether the fourth defendant was the agent of the third defendant; (iv) whether it was a term of the facilities agreement that the drawdown could only be approved upon the arrival of the major machinery; and (v) whether the fourth defendant was required to check to ensure that each item of machinery mentioned in the EPCC contract list had been delivered to the project site.

Held (dismissing plaintiff's claim with costs):

(1) The plaintiff, in the civil suit expressly averred that the machinery supplied by the first defendant and Rapidtech to the second defendant under the ECC contract was defective. The omission to pursue the present claim in the earlier action was fatal because of the principle that *res judicata* embraces both the claims raised in the earlier litigation and the claims that could have been raised but were not. Therefore *res judicata* principle applied to this case to preclude the plaintiff from bringing the present action against the first defendant. There was no special circumstances that called for or justified the exercise of the court's discretion against applying *res judicata* in this action. (paras 35 & 36)

(2) The onus was on the plaintiff to prove that the biodiesel plant was not able to produce biodiesel that met the commercial standard because of the machinery supplied by the first defendant's company. The evidence of the chemist was unreliable in the absence of credible evidence to show that the sample was in fact taken from the plaintiff's biodiesel plant in Kuching. Even if the evidence of the chemist was accepted, it merely proved that the oil produced by the plant did not meet the commercial standard. There was no evidence to show that this was because of the defective machinery supplied by the first defendant. (paras 38, 40 & 41)

(3) The best evidence to establish that the biodiesel plant was not able to produce oil to the commercial standard, would have been a report by an expert to show that the machinery supplied by Rapidtech was defective and impaired the ability of the biodiesel plant to produce oil. Nor was any report produced to indicate that the machinery supplied by Rapidtech was defective and this rendered the biodiesel plant unable to produce biodiesel oil of the American or European standard. (para 42)

(4) It is settled law that as part of the process of construction, the court has power to correct obvious mistakes in the written expression of the intention of the parties. Rectification of a contract is not necessary if there is an obvious mistake or misnomer in a document. The mistake in cl. 2.01 is discernible from the letter of appointment that the plaintiff

issued to the ICE. Applying the principle in the case of *Ng Siew Wah & Ors v. MAA Holdings Sdn Bhd & Anor*, it was clear that cl. 2.01 must be disregarded as it did not reflect what the parties had intended to be the position of the ICE. (paras 50, 51 & 53)

(5) The letter of appointment was a specific agreement dealing with the position of the ICE, whilst the facilities agreement was a general agreement containing provisions which dealt with other matters as well. As a specific agreement, by necessary implication, it would override and govern the position of the ICE based on the maxim *generalibus specialia derogant*. The submission of the plaintiff that the ICE was the third defendant's agent therefore flew in the face of the clear terms of the letter of appointment. (paras 54 & 55)

(6) The relevant provision in the facility agreement did not indicate that the arrival of the major equipment at the site was a condition precedent for the third drawdown. The provisions in the EPCC contract did not apply to the facilities agreement. Therefore, the submission of the plaintiff that the arrival of the major equipment was a condition precedent for the third drawdown was not accepted. (paras 57 & 58)

(7) The plaintiff's submission that the third milestone progress claim attached to the drawdown notice should have aroused the suspicion of the bank lacked merit. There was a joint site visit between the plaintiff and the bank approximately two weeks before the issuance of the third drawdown notice. At this site visit, both Tony and the first defendant were present with the bank's representatives. In the light of this evidence, it was understandable as to why the bank had no reason to suspect that something was amiss. (para 62)

(8) The third drawdown was released by the bank after receiving the drawdown notice signed by the first defendant on behalf of the plaintiff. No protest was made by the plaintiff when the monies were released to its account. Having received a benefit, the plaintiff was clearly estopped by its conduct from asserting that the third defendant was negligent in releasing the third drawdown. (para 63)

(9) Although estoppel was not pleaded in the defence of the third defendant, it did not prevent the third defendant from invoking the defence. The facts amounting to an estoppel preventing the plaintiff from asserting that the defendants were negligent had been established. Thus, the court could and ought to accept the plea of estoppel made by the defendants notwithstanding that it had not been pleaded. (paras 64 & 66)

(10) It was the duty of the ICE to certify that payment was due to the second defendant as expressly provided in the facilities agreement. It is common ground that the equipment that had not been delivered to the site at the date of the ICE's certification, did eventually arrive and was installed in the biodiesel plant. Therefore, this was not a case of machinery that was not delivered to the site on the date of the certification never arrived at all. In the light of this, it was not open to the plaintiff to assert that the ICE was negligent. (paras 67 & 70)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Central Lorry Service Co Sdn Bhd v. The American Insurance Co [1980] 1 LNS 175 OCJ ***(refd)***

Chan Yuow Seng v. Ling Ong Hua [1994] 1 LNS 24 HC ***(refd)***

Chua Wee Seng v. Fazal Mohamed [1970] 1 LNS 19 HC ***(refd)***

Henderson v. Henderson [1843] 3 Hare 100 ***(refd)***

Johnson v. Gore-Wood [2002] 2 AC 1, [2001] 1 All ER 481, [2001] BCLC 313 ***(refd)***

Kekatong Sdn Bhd v. Bumiputra-Commerce Bank Bhd & Anor [2002] 7 CLJ 175 HC ***(refd)***

Lee Sem Yoong v. Leong Yoong [1967] 1 LNS 81 HC ***(refd)***

Malaysia National Insurance Sdn Bhd v. Abdul Aziz bin Mohamed Daud [1978] 1 LNS 117 FC ***(refd)***

Ng Siew Wah & Ors v MAA Holdings Sdn Bhd & Anor [1985] 1 LNS 37 FC ***(foll)***

North Circular Properties Ltd v. Internal Systems Organisation Ltd (Unreported) ***(refd)***

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***

T & TT Enterprise Sdn Bhd v. Lembaga Pembangunan dan Lindungan Tanah [2009] 2 CLJ 160 CA ***(refd)***

Taylor v. Rive Droite Music Limited [2005] All ER (D) 72 ***(refd)***
The Pacific Bank Bhd v. Chan Peng Leong [1998] 2 CLJ 440 CA ***(refd)***
United Merchant Finance Bhd v. Hockwood Holdings Sdn Bhd & Ors [1998] 1 LNS 356 HC ***(refd)***
Wilson v. Wilson [1854] 5 HL Cas 40 ***(refd)***

Other source(s) referred to:
Spencer Bower & Turner, *Estoppel by Representation*, 3rd edn, p 407
Walter Woon on Company Law, 3rd edn, p 98

For the plaintiff - Gideon Tan (YJ Yap with him); M/s Gideon Tan Razali Zaini
For the 1st defendant - CK Kang; M/s Kang Choong Keng & Co
For the 3rd defendant - JH Lim; M/s Zul Rafique & Partners
For the 4th defendant - Hakim Mohd Ali; M/s Shahinuddin & Ranjit

Reported by Emm Zehra

JUDGMENT

SM Komathy JC:

[1] The plaintiff's claim against the four defendants relates to a biodiesel plant that was constructed by the second defendant in Kuching. The biodiesel plant is said to be unable to produce oil that meets the commercial standard.

The Facts

[2] The events which led to this action are as follows. The plaintiff company was incorporated sometime in the year 2005 by the first defendant and one Tony Goh Sook San ("Tony") (PW1) for the purpose of a construction contract. Tony and the first defendant were the only two directors of the company at all material times.

[3] On 4 July 2007, the plaintiff entered into an engineering, procurement, construction and commissioning contract ("the EPCC") with the second defendant for the construction of a biodiesel plant ("the project") in Kuching, Sarawak. The contract price of this design and build contract was RM63,500,000 subject to final measurement upon the completion of the work. Clause 1.5 of the EPCC contract expressly provided in for "the appointment of CM Bernardini, Italy (and its associate in Malaysia, Intersonikon Engineering Sdn Bhd) or another company with proven track record to be the technology provider for the project".

[4] The plaintiff approached Bank Pembangunan Malaysia Berhad, the third defendant to partially finance the construction of the biodiesel plant. The third defendant agreed to partially fund the project pursuant to a letter of offer dated 8 December 2006, letter of changes dated 6 March 2007, letter of changes dated 31 May 2007, the facilities agreement dated 19 October 2008, letter of changes dated 21 February 2008, and with letter of changes dated 21 October 2009 (hereinafter referred to as the "facilities agreements").

[5] Pursuant to a letter of appointment dated 30 May 2007, the fourth defendant was appointed by the plaintiff as the Independent Checking Engineer ("ICE") from a panel of consultants of the third defendant. Copies of all reports prepared by the ICE in relation to their checking and inspection of the work carried out by the second defendant based on the work schedule were submitted to the plaintiff and third defendant at all times.

[6] In April 2009 a company called Rapidtech Solutions Sdn Bhd ("Rapidtech") was appointed as the technology provider of this project instead of CM Bernardini. This company belonged to the first defendant. Neither the third nor the fourth defendants were informed of this substitution.

[7] On 17 April 2009, the plaintiff submitted to the third defendant its request for the third draw down, after receiving the second defendant's third milestone progress claim on 9 February 2007. Pursuant to the terms of the EPCC contract, the third progress claim was payable to the second defendant upon the arrival of the "major equipment" at the project site. The third defendant approved and released the third drawdown of RM11,850,000 on 13 May 2009. In so doing, the third defendant had, amongst others, relied on a report prepared by the ICE in May ("the third ICE review report") stating that based on its two site visits on 22 and 23 April 2009, the plaintiff had complied with the drawdown conditions. The report also consisted, an annexure which was a list ("the major equipment list") which itemised the various components that constituted major machinery under the EPCC contract.

[8] In September 2009, the plaintiffs commenced civil suit D-22NCVC-95-2009 in the Kuala Lumpur High Court against the first defendant and Rapidtech seeking a declaration that the first defendant was in breach of his fiduciary duties in appointing

Rapidtech as technology provider without disclosing to the board that this company belonged to him. It sought to recover the sum of RM9,500,000 received by Rapidtech from the second defendant.

[9] On 21 May 2010, the plaintiff commenced the present action against all the four defendants claiming for damages.

[10] On 7 June 2010 the parties recorded consent judgment before Hue Siew Keng J in respect of civil suit D-22NCVC-95-2009. The material portion of the judgment was in these terms:

(a) Defendan Pertama telah memungkiri tanggungjawabnya sebagai seorang pengarah plaintif dengan menyebabkan defendan kedua untuk menjadikan pembekal teknologi bagi projek tersebut secara langsung dan tidak langsung dan dalam penerimaan wang sebanyak RM9,500,000.00; dan

(b) Kedua-dua pihak untuk menanggung kos masing-masing.

[11] On 4 December 2012, the third defendant commenced an action against the plaintiff, Tony and the first defendant *vide* civil suit 22NCC-1793-12/2012 to recover the monies outstanding under the facilities agreement. It obtained default judgment against the plaintiff on 14 January 2013. The plaintiff failed in its bid to set aside the default judgment before the Registrar and the judge. The claim against Tony is still pending.

[12] The plaintiff withdrew its claim against the second defendant on 22 June 2012 when the latter was wound-up by the Kuala Lumpur High Court on 24 August 2011.

Case For The Plaintiff

[13] The plaintiff's claim against the first defendant is for damages suffered as a result of the latter's company (Rapidtech) supplying machinery and equipment that were defective to the second defendant under the EPCC contract. This resulted in the biodiesel plant that was constructed by the second defendant being unable to produce biodiesel oil that could meet the American and European quality standard.

[14] The claim against the third defendant is premised on the allegation that it had been negligent in approving and releasing the third drawdown in breach of the conditions stipulated in the facilities agreement. It is alleged that the arrival of major equipment at the project site was a pre-condition for the release of the third drawdown. The third defendant had, however, released the monies

before the delivery of the major equipment to the site. The plaintiff further alleged that the ICE was the agent of the third defendant in this transaction and as the fourth defendant's principal, the bank is vicariously liable for the negligent acts of its agent.

[15] The claim against the fourth defendant is based on the allegation that it had been negligent in certifying that the conditions for the third drawdown had been met, in particular, that the major machinery had already arrived at the site, when it had not.

[16] Further, and/or in the alternative the plaintiff alleged that the first, third and fourth defendants had conspired and colluded with intent to injure and defraud the plaintiff to cause loss.

The First Defendant's Response

[17] The first defendant denied that the biodiesel plant was not capable of producing biodiesel that met the American quality standard ASTM 6751 and European quality standard EN 14214. Alternatively, it is argued that the plaintiff's claim is barred by the principle of *res judicata* because of the consent judgment recorded in civil suit D-22NCVC-95-2009. The first defendant also vehemently denied that he had colluded with the other defendants.

The Third And Fourth Defendants' Response

[18] The third defendant denied that it had been negligent in releasing the third drawdown to the plaintiff. It is averred that it had no obligation to ensure that all major equipment had been delivered to the site before it could approve the release of the third drawdown. It is also denied that the ICE was its agent in certifying that the conditions for the release of drawdown had been met.

[19] The fourth defendant denied that it had been negligent in certifying that all major machinery had arrived at the project site. It is alleged that it was impossible for an ICE to check each and every component in the major equipment list in certifying that the major machinery had been delivered to the site. All that was required was to ensure that the main items were there.

[20] Both the third and fourth defendants further denied there was collusion or conspiracy between them and the first defendant to injure or defraud the plaintiff.

Witnesses

[21] The plaintiff called three witnesses to establish its case. They were its directors, Tony and one Eshlie bin Ahmad ("Eshlie") (SP3) and Sim Hang Thiew (SP1), a consultant chemist. The first defendant testified and did not call any witnesses. The third and fourth defendants called two witnesses each. The witnesses called by the third defendant were Ibrahim bin Yusof (SD2) and Azman bin Ahmad (SD3), who were its assistant manager and an officer from the technical department. Both these witnesses had carried out a joint inspection at the project site with the plaintiff prior to the release of the third drawdown. The fourth defendant called Mohd Nor bin Hassan (SD4) and Mohd Zainal bin Lamit (SD5). Mohd Zainal was the fourth defendant's representative who prepared the ICE review reports based on his visits to the project site, whilst Mohd Nor was his superior and the one who reviewed these reports.

Salient Clauses In Facilities Agreement

[22] Clause 2.01 of the facilities agreement defined ICE as follow:

> A technical consultant or any other ICE acceptable to BPMB, appointed by BPMB at the cost of the Borrower, as BPMB's independent checking engineer, to advise BPMB on all matters relating to the project including all verification works to each Drawdown on the Loan Facilities.

[23] Clause 5.01(t) was in these terms:

> The Borrower shall have appointed a Technical Consultant from the panel of consultant of BPMB who shall act as Independent Checking Engineer ("ICE") or Consultant acceptable to BPMB who shall cover the scope of works as follow:
>
> (i) Review the Operation & Maintenance ("O&M") plan and the proposed O&M staff for the Project;
>
> (ii) Verify and certify all claims for payment related to the Project;
>
> (iii) Review the contract agreement between the Borrower and the technology provider and the EPCC contractor related to the Project; and
>
> (iv) Other scope of works identified by BPMB's Technical,
>
> And all costs of such appointment shall be fully borne by the Borrower.

A In the event BPMB is not satisfied with the services provided by the ICE or the Consultant appointed by the Borrower, BPMB reserves the right to appoint another ICE or Consultant to monitor, verify and certify all claims submitted to BPMB for payment;

B **[24]** Clause 6.01(c) stated as follow:

All Drawdown Notices shall be supported by certificate for payment, certified by the Independent Checking Engineer ("ICE") or Architect or Consultant and/or other relevant documents as C determined by BPMB.

Salient Clauses In EPCC Contract

[25] It is necessary to set out two salient clauses from the EPCC contract as the plaintiff's claim against the third and fourth D defendants is premised upon them. They are cls. 1.5 and 7.3 (b).

Clause 1.5

The employer hereby confirms that CM Bernardini, Italy or another company with proven track record shall be the technology E provider.

Clause 7.3(b)

a further sum equivalent to TWENTY FIVE PER CENT (25%) OF THE Contract Price upon the Major Equipment arriving at F the Work Site.

Issues

[26] The issues for determination in this case arising from the contentions of the parties are:

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(a) whether the plaintiff's claim is barred by *res judicata*.

(b) whether the biodiesel plant is not able to produce oil that does not meet the American quality standard ASTM 6751 and H European quality standard EN 14214;

(c) whether the fourth defendant was the agent of the third defendant;

(d) whether it was a term of the facilities agreement that the I drawdown could only be approved upon the arrival of the major machinery;

(e) whether the fourth defendant was required to check to ensure that each item of machinery mentioned in the EPCC contract list had been delivered to the project site; and

(f) whether the defendants had conspired to injure the plaintiff.

Issue (a): Whether Claim Against First Defendant Barred By Res Judicata

[27] The first defendant contended that the plaintiff's claim against him is barred by the doctrine of *res judicata*. The first defendant contended that in view of the consent judgment recorded in civil suit D-22NCVC-95-2009, the plaintiff is precluded from filing this action based on the "Rule in *Henderson v. Henderson*" which precludes a plaintiff from bringing a fresh action in respect of a matter which he could have claimed in an earlier action. It is contended that the subject-matter of the earlier proceedings and the present action is substantially the same and relates to the machinery supplied by Rapidtech. The plaintiffs could have sought damages for the alleged defective machinery in the earlier suit but, instead confined its claim to recover the secret profit made by him. He also cited the local decisions in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 AMR 2559, *Lee Sem Yoong v. Leong Yoong* [1967] 1 LNS 81; [1967] 2 MLJ 86 and *Chan Yuow Seng v. Ling Ong Hua* [1994] 1 LNS 24; [1995] 2 MLJ 580 to support this proposition.

[28] The plaintiff responded by contending that the principle of *res judicata* has no application to this case as one of the conditions to be fulfilled before this principle can be invoked is that the causes of action in both the proceedings must be the same. It is said that a comparison of the pleadings in both cases would show that this condition is not fulfilled. It is pointed out that the claim in civil suit D-22NCVC-95-2009 was for the secret profit made by the first defendant in not disclosing to the board of directors of the plaintiff that his company had supplied the machinery under the EPCC contract. However, in the present case, the claim is for losses suffered as a result of defective machinery supplied by his company. In support of this argument, reliance is placed on the decisions in *The Pacific Bank Bhd v. Chan Peng Leong* [1998] 2 CLJ 440 and *Chua Wee Seng v. Fazal Mohamed* [1970] 1 LNS 19; [1971] MLJ 106.

[29] Before dealing with this issue, I will briefly discuss the reach of the principle of *res judicata*. The principle of *res judicata* is well-established in our law. *Res judicata* is a form of estoppel. It means that any action or issue that has been litigated and decided cannot be retried in a subsequent action between the same parties or their privies. The object of *res judicata* is judicial finality. Two reasons are commonly put forward for the principle: no person should be sued more than once for the same claim, and the law should not tolerate needless litigation.

[30] It would be apposite at this juncture to refer to *Henderson v. Henderson* [1843] 3 Hare 100. Sir James Wigram V-C said the following in a very well-known passage (at pp. 114-115):

> … where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[31] In *Asia Commercial* (*supra*), Peh Swee Chin FCJ, made the following observation in regard to the above passage (at p. 792 (CLJ); p. 2572 (AMR)):

> To revert to that famous passage set out above, the next step is to state our view on its scope of operation or approach towards such scope which has given rise to certain controversial aspects referred to earlier. *Bearing in mind the well-known relevancy of a previous judgment in barring a second suit, e.g. please see s. 40 of Evidence Act, 1950, it will be readily understood that when Wigram VC spoke of "points", the points should actually include causes of action, or all causes of action which one of the two parties against the has other, based on, or substantially on the same facts or issues, and not just all issues of law or fact that are in dispute between the parties*. The relevant case law revolves itself into this understanding. Lack of this understanding causes, on our view, a fair share of the confusion in connection with the famous passage of Wigram, VC which Lord Shaw in *Hoystead v. Commissioner of Taxation* [1962] AC 155, 170 spoke of as "settled law" in the Privy Council.
> (emphasis added)

[32] The rule in *Henderson v. Henderson* received its modern exposition in the decision of the House of Lords in of *Johnson v. Gore-Wood* [2002] 2 AC 1, [2001] 1 All ER 481, [2001] BCLC 313. The leading speech was that of Lord Bingham of Cornhill. Having analysed the earlier authorities on the subject, he set out the principles at 30H-31F:

> It may very well be, as has been convincingly argued (Watt, *'The Danger and Deceit of the Rule in Henderson v. Henderson*: A new approach to successive civil actions arising from the same factual matter', 19 Civil Justice Quarterly, (July 2000), page 287), that what is now taken to be the rule in *Henderson v. Henderson*, has diverged from the ruling which Wigram V-C made, which was addressed to *res judicata*. But *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an

A issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.

C **[33]** Lord Bingham continued at p. 59:

> ... these various defences are all designed to serve the same purpose: to bring finality to litigation and avoid the oppression of subjecting a Defendant unnecessarily to successive actions. While the exact relationship between the principle expounded by Sir James Wigram V-C and the defences of *res judicata* and cause of action and issue estoppel may be obscure, I am inclined to regard it as primarily an ancillary and salutary principle necessary to protect the integrity of those defences and prevent them from being deliberately or inadvertently circumvented.
>
> *In one respect, however, the principle goes further than the strict doctrine of res judicata or the formulation adopted by Sir James Wigram V-C, for I agree that it is capable of applying even where the first action concluded in a settlement. Here it is necessary to protect the integrity of the settlement and to prevent the Defendant from being misled into believing that he was achieving a complete settlement of the matter in dispute when an unsuspected part remained outstanding.*
> (emphasis added)

[34] It is clear from the passages quoted above, that there are two aspects of *res judicata*. The first, is the principle that the rule of *res judicata* embraces not only those claims which were proven in the earlier action, but those which might have been proven in that action. Second, that the court retains a discretion to refuse to apply *res judicata* when to do so would cause unfairness or work an injustice. This is deemed necessary because although the principle of *res judicata* reflects the public interest in the finality of litigation, sometimes an unyielding and rigid application of the principle would be unfair to a party who is precluded from re-litigating an issue. Judicial discretion is thus required to achieve practical justice without undermining the object of *res judicata*.

[35] Applying the aforesaid principles to the present case, it is relevant to note that the plaintiff had in para. 15 in its statement of claim in civil action D-22NCVC-95-2009 expressly averred that the machinery supplied by the first defendant and Rapidtech to the second defendant under the EPCC contract was defective. This shows that this issue the plaintiff was alive to this issue and could have included a claim for damages in that earlier action. It failed to do so and elected to settle the action by entering into a consent judgment with the first defendant. The omission to pursue the present claim in that action is fatal because of the principle that *res judicata* embraces both those claims raised in the earlier litigation and those claims that could have been raised but were not. I therefore find that the *res judicata* principle applies to this case to preclude the plaintiff from bringing the present action against the first defendant.

[36] I further find that there are no special circumstances in this case that calls for or justifies the exercise of my discretion against applying *res judicata* in this present action.

[37] The plaintiff's claim against the first defendant can be disposed of on this point. In the event, I am wrong in my view, I proceed to consider the plaintiff's allegation that the machinery supplied by the first defendant's company was defective and resulted in the biodiesel plant being unable to produce oil that met the commercial standard.

Issue (b): Whether The Biodiesel-plant Is Not Able To Produce Oil That Does Not Meet The American Quality Standard ASTM 6751 And European Quality Standard EN 14214

[38] I observe that the plaintiff's complaint made by the plaintiff about the inability of the biodiesel plant to produce oil that met the American or European standard, is a serious one. The onus is on the plaintiff to prove that the biodiesel plant was not able to produce biodiesel that met the commercial standard because of the machinery supplied by the first defendant's company.

[39] On behalf of the plaintiff evidence was adduced by the consultant chemist that on 11 May 2010, he was given a sample of biodiesel oil by a company called Senari Biofuels Sdn Bhd ("Senari") to analyse. Senari's two directors, Eshlie and one Dato' Abang Hj Khalid bin Tan Sri Dato' Amar Abang Hj Marzuki had become directors in the plaintiff company on 24 July 2009, upon

their company, Abadi Utama Global Sdn Bhd, investing into the plaintiff. Senari rented the biodiesel plant from the plaintiff in January 2010.

[40] The first defendant stressed that the only piece of evidence produced by the plaintiff to establish this critical fact is the evidence of the chemist that his analysis of the sample indicated that the oil did not meet the European and American quality standard. It is submitted that the evidence of the chemist is unreliable in the absence of credible evidence to show that the sample was in fact taken from the plaintiff's biodiesel plant in Kuching. It is further contended that the quality of the biodiesel oil produced by the plant was also dependent on other factors like the skill of the employees operating the machines and the materials used.

[41] It was said that even if the evidence of the chemist is accepted, it merely proves that the oil produced by the plant did not meet the commercial standard. There is no evidence to show that this was because of the defective machinery supplied by the first defendant.

[42] The defendant further argued that the best evidence to establish that the biodiesel plant was not able to produce oil to the commercial standard, would have been a report by an expert to show that the machinery supplied by Rapidtech was defective and impaired the ability of the biodiesel plant to produce oil. Nor was any report produced to indicate that the machinery supplied by Rapidtech was defective and this rendered the biodiesel-plant unable to produce biodiesel oil of the American or European standard. In my view, the evidence of Sim is insufficient to establish that the biodiesel plant was unable to produce oil that met the American or European standard. The best evidence would be an independent report.

[43] I entirely agree with the points made by the first defendant.

Issue (c): Whether The Fourth Defendant Was The Agent Of The Third Defendant?

[44] It is common ground that the third defendant had issued a letter of offer dated 8 December 2006 to the plaintiff prior to the execution of the facilities agreement. It was an express term of the letter of offer that the plaintiff should appoint an ICE from the third defendant's panel of consultants. It is also common ground

that pursuant to the said term, the plaintiff had by way of letter dated 30 May 2007 appointed the fourth defendant as its ICE. The relevant portions of this letter provided:

> We Global Bonanza Sdn Bhd. Are pleased to award the provision of services as Independent Consulting Engineer (ICE) for our 120,000 Metric Tonnes Biodiesel Plant at Lot 1061, Light Industrial Park (LIPPOR), Muara Tebas Land District, Jalan Bako, Kuching, Sarawak to Jurutera Perunding Zaaba Sdn Bhd Subject to the terms and conditions stipulated herein.
>
> Scope of Services
>
> The scope of services shall be in accordance with the terms of reference set out by the Bank Pembangunan Malaysia Bhd (BPMB) in their letter of offer to Global Bonanza.
>
> The Fees
>
> The total fee for the ICE services is RM140,000.00 (Ringgit Malaysia One Hundred Fourty Thousand Only), excluding the 5% GST payable by the client.
>
> Terms of Payment
>
> Initial payment of RM10,000.00 on June 16th 2007 and a monthly payment RM10,000.00 per month for thirteen (13) months.

[45] Neither is it in dispute that pursuant to this appointment, the plaintiff did in fact make part payment of the ICE's fees.

[46] The plaintiffs contended that the letter of appointment does not conclusively establish that ICE was its agent. In this connection, the plaintiff drew the attention of the court to cl. 2.01 of the facilities agreement and contended that this provision demonstrated that the ICE was not its agent, but the agent of the third defendant. This clause was worded as follows:

> Clause 2.01
>
> A technical consultant or any other ICE acceptable to BPMB, appointed by BPMB at the cost of the Borrower, as BPMB's independent checking engineer, to advise BPMB on all matters relating to the project including all verification works to each Drawdown on the Loan Facilities.

[47] In response, the third defendant argued that the plaintiff's reliance on this provision is misconceived in view of s. 5.01 (t) of the facilities agreement. It is said that this provision illustrates that the ICE was never its agent. This clause read as follows:

> Clause 5.01 (t)
>
> The Borrower shall have appointed a Technical Consultant from the panel of consultant of BPMB who shall act as Independent Checking Engineer ("ICE") or Consultant acceptable to BPMB who shall cover the scope of works as follow:
>
> a. Review the Operation & Maintenance ("O&M") plan and the proposed O&M staff for the Project;
>
> b. Verify and certify all claims for payment related to the Project;
>
> c. Review the contract agreement between the Borrower and the technology provider and the EPCC contractor related to the Project;
>
> d. Other scope of works identified by BPMB's Technical,
>
> And all costs of such appointment shall be fully borne by the Borrower.
>
> In the event BPMB is not satisfied with the services provided by the ICE or the Consultant appointed by the Borrower, BPMB reserves the right to appoint another ICE or Consultant to monitor, verify and certify all claims submitted to BPMB for payment;

[48] The plaintiff contended that in view of the inconsistency between these two provisions, the *contra proferentem* rule is to be applied to construe the inconsistent provisions. Where there is a doubt or ambiguity as to the meaning of a contract, the words will be construed against the person who put them forward. In support of this well-established rule, reliance is placed, *inter alia*, on the decisions in *Central Lorry Service Co Sdn Bhd v. The American Insurance Co* [1980] 1 LNS 175; [1981] 2 MLJ 40 and *Malaysia National Insurance Sdn Bhd v. Abdul Aziz bin Mohamed Daud* [1978] 1 LNS 117; [1979] 2 MLJ 29.

[49] On the other hand, the third defendant contended that it would be wrong to resort to the *contra proferentem* rule as it is evident that there is a mistake in cl. 2.01 of the facilities agreement. It is said that the third defendant's letter of offer to

the plaintiff and the plaintiff's letter of appointment to the ICE, amply demonstrate this point. The third defendant contended that the court has the power to give effect to the intention of the parties by disregarding the drafting error in cl. 2.011. In support of this approach, reliance is placed on the decision of the Court of Appeal in *T & TT Enterprise Sdn Bhd v. Lembaga Pembangunan dan Lindungan Tanah* [2009] 2 CLJ 160; [2009] 2 MLJ 205. In that case, it was reiterated that it is trite law that where in a transaction more than one document is involved, the courts usually construe those documents together in determine the meaning of the terms in the contract. In addition to this authority, the bank also relied on *United Merchant Finance Bhd v. Hockwood Holdings Sdn Bhd & Ors* [1998] 1 LNS 356; [1999] 5 MLJ 85, *Taylor v. Rive Droite Music Limited* [2005] All ER (D) 72.

[50] It is settled law that as part of the process of construction the court has power to correct obvious mistakes in the written expression of the intention of the parties. This is clearly illustrated by the well known passage from a case decided in the 19th century, namely *Wilson v. Wilson* [1854] 5 HL Cas 40. At p. 66, Lord St Leonards said:

> Now it is a great mistake if it be supposed that even a Court of Law cannot correct a mistake, or error on the face of an instrument; there is no magic in words. If you find a clear mistake and it admits of no other construction, a Court of Law, as well as a Court of Equity, without impugning any doctrine about correcting those things which can only be shown by parol evidence to be mistakes-without, I say, going into those cases at all, both Courts of Law and of Equity may correct an obvious mistake on the face of an instrument without the slightest difficulty.

[51] The above passage was cited with approval and applied by the Supreme Court in *Ng Siew Wah & Ors v MAA Holdings Sdn Bhd & Anor* [1985] 1 LNS 37; [1985] 2 MLJ 332. The principle established in that case is that rectification of a contract is not necessary if there is an obvious mistake or misnomer in a document.

[52] The distinction between the correction of errors by construction and the equitable remedy of rectification was pointed out in *North Circular Properties Ltd v. Internal Systems Organisation Ltd* (Ch D, unreported, October 26, 1984):

> Of course the court will not lightly, as part of the construction process, tamper with the actual words used, particularly in a commercial document such as a lease. On the other hand the law is not such an ass as to compel the court to hold the parties to the actual words used when it is, as in my judgment it is in this case, clear from the document itself, without looking at extrinsic, evidence, that such words were used only by virtue of a draftsman's blunder. Such a process of correction of obvious drafting errors in the process of construction is of course distinct from the equitable doctrine of rectification. The former can only be adopted where the fact that a mistake has been made and the nature of the mistake can be ascertained with certainty from a consideration of the relevant instrument in the context of objective circumstances surrounding its execution. Rectification, on the other hand, will be appropriate in many other cases where the existence and nature of a mistake are apparent only from extrinsic evidence of the actual intention of the parties.

[53] The mistake in cl. 2.01 is discernible from the letter of appointment that the plaintiff issued to the ICE. Applying the principle in *Ng Siew*'s case, it is clear that cl. 2.01 must be disregarded as it does not reflect what the parties had intended to be the position of the ICE.

[54] In any event, it is important to note that the letter of appointment is a specific agreement dealing with the position of the ICE, whilst the facilities agreement is a general agreement containing provisions which dealt with other matters as well. As a specific agreement, by necessary implication, it will override and govern the position of the ICE based on the *maxim generalibus specialia derogant* (special provisions override general ones). See *Kekatong Sdn Bhd v. Bumiputra-Commerce Bank Bhd & Anor* [2002] 7 CLJ 175; [2002] 6 MLJ 186. The submission of the plaintiff that ICT was the third defendant's agent, therefore flies in the face of the clear terms of the letter of appointment.

[55] I therefore find no merit in the point taken on behalf of the plaintiff that the ICE was the agent of the third defendant.

Issue (d): Whether It Was A Term Of The Facilities Agreement That The Drawdown Could Only Be Approved Upon The Arrival Of The Major Machinery

[56] The plaintiff argued that the third defendant was negligent in releasing the third drawdown to it prior to the delivery of the major equipment at the project site. It is said that it was a condition for the third drawdown that the major equipment

mentioned in the EPCC contract had arrived at the site. By disbursing the monies before the fulfilment of this condition, the third defendant was in breach of its obligations under the Facilities Agreement. The third defendant contended that this point was without any valid basis and that cl. 6.01(b) of the facilities agreement sets out the conditions to be fulfilled for a drawdown and, that there is nothing in this provision which imposes an obligation on the third defendant to release the third drawdown only upon the arrival of the major equipment at the site. The third defendant further alleged that it did not owe a duty of care to the plaintiff to ensure that the monies were released only upon the compliance of the provisions in the EPCC contract. The third defendant emphasised that the provision in the EPCC contract that stipulated that payment was due to the second defendant only upon the arrival of the major equipment, was only binding on the plaintiff and the second defendant. The third defendant was a stranger to the agreement as it not a party to the said agreement.

[57] In view of the rival positions taken by the parties, it becomes necessary to examine the relevant provision for drawdown in the facilities agreement. This provision reads:

> Section 6.01 (b)
>
> Subject to the fulfilment of sub-clause (a) above, not less than fourteen (14) Business Day prior to the proposed Drawdown Date (which shall be the Business Day during the Availability), BPMB shall have received from the Borrower a duly completed irrevocable Drawdown Notice in the form of the Second Schedule hereto requesting for the Drawdown.

[58] This provision does not indicate that the arrival of the major equipment at the site was a condition precedent for the third drawdown. The provisions in the EPCC contract do not apply to the facilities agreement. I therefore do not accept the submission of the plaintiff that the arrival of the major equipment was a condition precedent for the third drawdown.

[59] I turn next to consider the point made by the plaintiff that the fact that the plaintiff had submitted the third drawdown notice to the bank does not absolve it from liability. The plaintiff contended that the fact that the first defendant had issued the said notice even before the arrival of the major equipment, should

have put the third defendant on inquiry as to the first defendant's authority to sign the drawdown notice. The third milestone progress claim submitted together with the drawdown notice would have revealed this fact to the bank. There is no evidence that any inquiries were made. It is submitted that in the absence of inquiries, the third defendant cannot claim the benefit of the presumption of regularity or an estoppel. In support of this argument, the plaintiff relied on the following passage from *Walter Woon on Company Law* (3rd edn.) at p. 98:

> If there are suspicious circumstances about the transaction that would put the contracting party on inquiry, he cannot glibly assume that everything is in order and rely on the presumption of regularity. Sometimes the circumstances are such that a reasonable man would be suspicious of the agent's authority: If this is so, the contracting party must make reasonable inquiries. If such inquiries would have revealed the agent's lack of authority, the contracting party cannot rely on the indoor management rule to assist him.
>
> In the absence of inquiries, the third party cannot claim the benefit of the presumption of regularity or an estoppel. The fact that the agent seems to be benefiting from the transaction while the company is not should rise the suspicion of a reasonable third party.

[60] The third defendant countered this submission by contending, that as an outsider dealing with the plaintiff, it is under no obligation to investigate whether the first defendant was properly authorised by the board to issue the drawdown notice and is entitled to rely on the benefits of the rule in *Turquand*'s case that persons contracting with a company and dealing in good faith may assume that acts within its constitution and power have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular. See *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639; [1995] 2 MLJ 770 and *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793; [1998] 1 MLJ 465. It is said that the plaintiff is estopped from asserting that the third defendant had been negligent in releasing the third drawdown in reliance upon the drawdown notice.

[61] In *Aik Ming* (*supra*) case, Gopal Sri Ram JCA, quoted with approval the following passage at p. 247 from *Palmer's Company Law* (24th edn.) as a correct statement of the law on the *Turquand*'s rule:

> According to this rule, while persons dealing with a company are assumed to have read the public documents of the company and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more; they need not inquire into the regularity of the internal proceedings-what Lord Hatherley (in *Mahony v. East Holyford Mining Co* [1875] LR 7 HL 869 at p 898) called 'the indoor management' - and may assume that all being done regularly (*omniapraesumuntur rite et solemniteresseacta*)
>
> This rule, which is based on a general presumption of law, is eminently practical, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed. Thus, where the articles give power to borrow with the sanction of an ordinary resolution of the general meeting, a lender who relies on this power need not inquire whether such sanction has in fact been obtained. He may assume that it has, and if he is acting *bona fide* he will, even though the sanction has not been obtained, stand in as good a position as if it had been obtained.

[62] The plaintiff's submission that the third milestone progress claim attached to the drawdown notice should have aroused the suspicion of the bank lacks merit. It is an evidence that there was a joint site visit between the plaintiff and the bank on 31 March 2009, approximately two weeks before the issuance of the third drawdown notice. At this site visit, both Tony and the first defendant were present with the banks representatives, namely SD3 and SD4. In the light of this evidence, it is understandable as to why the bank had no reason to suspect that something was amiss. The point taken by the plaintiff is therefore unsustainable.

[63] The plaintiff is estopped from asserting that the third defendant was negligent in releasing the third drawdown. The third drawdown was released by the bank after receiving the drawdown notice signed by the first defendant on behalf of the plaintiff. In accordance with the request in the said notice, a sum of RM11,850,000 was remitted by the third defendant to the plaintiff's account. No protest was made by the plaintiff when the monies were released to its account. Having received a benefit, the plaintiff is clearly estopped by its conduct from asserting that the third defendant was negligent in releasing the third drawdown.

[64] It is true that estoppel is not pleaded in the defence of the third defendant. This, however, does not prevent the third defendant invoking this defence. This is exemplified by the decision of the Federal Court in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283. In that case, Gopal Sri Ram JCA articulated the principle in the following words:

> Thus, although courts, through their pronouncements, require estoppel to be pleaded, there is also judicial recognition of circumstances that may take a particular case out of the governing principle. First, there is the principle, already alluded to, that what requires to be pleaded are the relevant facts which a litigant claims to give rise to an estoppel and not any special formula *in staccato*: *Laws Holdings Pty Ltd v. Short* (1972) 46 ALJR 563 at p 571.
>
> Secondly, even where a party has failed to set out the material facts in his pleading, but there is occasioned no surprise to his opponent, a court may, in the interests of justice, permit the point to be taken: *Coppinger v. Norton* [1902] 2 IR 232 at p 243; *Co-operative Town Bank v. Shanmugam Pillay* AIR 1930 Rang 265 at p 268; *Laws Holdings*. Useful reference may also be had to the instructive judgment of Edgar Joseph Jr J in *Rosita bte Baharom & Anor v. Sabedin bin Salleh* [1992] 1 MLJ 379, affirmed by the Supreme Court in [1993] 1 MLJ 393.
>
> Thirdly, where there is no pleaded case of estoppel, but there is let in, without any objection, a body of evidence to support the plea, and argument is directed upon the point, it is the bounden duty of a court to consider the evidence and the submissions and come to a decision on the issue. It is no answer, in such circumstances, to say that the point was not pleaded: *Oversea-Chinese Banking Corp Ltd v. Philip Wee Kee Puan* [1984] 2 MLJ 1.

In *Habib Bank Ltd v. Habib Bank AG Zurich* [1981] 2 All ER 650 at p 666; [1981] 1 WLR 1265 at p 1287, Oliver LJ dealt with an argument upon a point of pleading in the following way:

> Finally, there was, says Mr Aldous, neither express allegation nor express proof that HBZ had acted upon the encouragement. There is certainly an allegation in relation to estoppel in para 15 of the defence that HBZ have relied upon the right to use their own name and motif and have been permitted by the plaintiffs to build up a goodwill therein. That goodwill, in fact, was amply proved by the banking documents and by HBZ's witnesses. I really cannot

> think that it was necessary formally to call a witness to say 'we did this in reliance upon the supposition that we were allowed to use our corporate name'. That reliance can be inferred from the circumstances as it was in *Greasley v. Cooke* [1980] 3 All ER 711 (see the judgment of Lord Denning MR, at p 712) and I think that the judge was perfectly justified in inferring it from the evidence before him in this case.

> It is to be emphasized that the categories of cases in which a court may permit an unpleaded point to be argued are not closed and that the foregoing three classes of cases are but mere illustrations of a much wider principle. It is this. A court may permit a litigant to argue that his opponent is estopped from raising a particular contention if it is in the interests of justice to do so. It is really a matter within the discretion of the particular judge who, when deciding where the justice of the case lies, must have due regard to all the circumstances of the case, including any injury or prejudice that may be caused by the affected party being taken by surprise. If a court comes to the conclusion that no injustice will be occasioned by permitting a party to raise estoppel as an issue, then, it may be justified in departing from the salutary rule contained in such decisions as *Haji Mohamed Dom v. Sakiman* [1956] MLJ 45 and *Anjalai Ammal & Anor v. Abdul Kareem* [1969] 1 MLJ 22 that imposes upon a judge the duty to strictly decide a case upon and only upon the issues raised in the pleadings and not upon an unpleaded case. Nevertheless, courts must ensure that the occasions upon which such a departure may be permitted are rare. For otherwise the rule which declares that a party is bound by its pleadings will be rendered meaningless.

> That the justice of the case should be the overriding consideration is axiomatic. After all, courts exist to do justice according to the law as applied to the substantial merits of a particular case. And rules of court and of practice are created to facilitate the attainment of justice, not its obstruction.

[65] In the final chapter of third edition of Spencer Bower and Turner, "*Estoppel by Representation*" dealing with pleading and procedure the following passage appears at p. 407 after a description of the general rule that estoppel must be pleaded:

> Nevertheless in accordance with the modern view that disputes should be dealt with on the merits, rather than on points of pleading, should it be clearly safe to take this course, the Courts have at times shown reluctance to disallow an estoppel though it

A has not been specifically pleaded in cases in which it is the logical and indisputable consequence of facts put forward and proved without objection at the hearing.

[66] On the evidence as it stood at the conclusion of the hearing, facts amounting to an estoppel preventing the plaintiff from asserting that the defendants were negligent, had been established. In my judgment this is a case where the court can and ought to accept the plea of estoppel made by the defendants notwithstanding it not having been pleaded.

C *Issue (e): Whether The Fourth Defendant Was Required To Check To Ensure That Each Item Of Machinery Mentioned In The EPCC Contract List Had Been Delivered To The Project Site*

[67] The plaintiff contended that the fourth defendant was D negligent in certifying that major equipment had arrived at the site, when it had not. As observed earlier, it was a term of the EPCC contract that the third progress claim was payable to the second defendant upon the arrival of the major equipment at the site. It is common ground that it was the duty of the ICE to certify that E payment was due to the second defendant as expressly provided in the facilities agreement.

[68] There is uncontroverted evidence that when ICE certified in May 2009, that the major equipment had already arrived at the F site, this was only partially correct. Some of the equipment described as major equipment had yet to arrive. The supporting documents attached to the ICE's review report indicated that these equipment were scheduled to arrive at the site in "end of May" or "end of June 2009".

G **[69]** The fourth defendant denied that they had an obligation and duty to check each and every item in the list given to it. In his evidence, SD5 explained:

> Yes, can. Basically I explained earlier, the whole thing is done H under the EPCC contract which is they involve the design, the procurement, the fabrication, there's a lot of thing that is being done by the contractor. Now if our role is in checking every item for purchase and for delivery, I think we're going to end up in trouble. Our scope is involved in getting evaluation whether the work has been done by the plaintiff themselves. Now the plaintiff I is the one that is asking us to do this. We are checking it. And PO, DO is to us is irrelevant, ok. That's my answer.

[70] It is common ground that the equipment that had not been delivered to the site at the date of the ICE's certification, did eventually arrive and was installed in the biodiesel plant. This is not a case of machinery that was not delivered to the site on the date of the certification never arrived at all. As observed earlier, a joint inspection attended by the first defendant, Tony, the ICE and several others was carried out at the site just prior to the third drawdown to determine if the major equipment had already arrived at the site. Shortly thereafter, the plaintiff submitted the third drawdown notice to the third defendant requesting for the disbursement of the monies. In the light of the foregoing considerations, in my view, it is not open to the plaintiff to assert that the ICE was negligent.

Issue (f): Whether The Defendants Had Conspired To Injure The Plaintiff

[71] I find no evidence whatsoever to suggest even remotely that there was a conspiracy between the defendants to defraud the plaintiff.

Conclusion

[72] For the reasons given, the plaintiff's claim against the defendants is dismissed with costs of RM10,000 to each defendant.